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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re R.D., a Person Coming
Under the Juvenile Court Law.

2d Juv. No. B293637
(Cons. w/ No. B295781)
(Super. Ct. No. J071315)
(Ventura County)

VENTURA COUNTY HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

R.L.,

Defendant and Appellant.

R.L. (Grandmother) appeals the juvenile court's orders terminating legal guardianship of her granddaughter R.D., and reunification services, and denying her Welfare and

Institutions Code¹ section 388 petition. She contends the court erred when it found that returning R.D. to her custody would create a “substantial risk of detriment” to R.D. (§ 366.22, subd. (a)(1).) She also contends that section 728, which authorizes a court to terminate a guardianship, is unconstitutional as applied here. We affirm.

FACTS AND PROCEDURAL HISTORY

In August 2016, the probate court granted Grandmother legal guardianship of R.D. In January 2017, social workers and police officers attempted to contact Grandmother after receiving a report that Grandmother and R.D.’s mother were “doing drugs” while R.D. was present. The police and social workers attempted to contact Grandmother multiple times and obtained a “home entry/interview” warrant, but were unable to locate her. After nine days, the police located Grandmother and R.D. at a motel in Camarillo and arrested Grandmother. After a brief placement in a foster home, R.D. was placed with her maternal cousins and has remained there ever since.

Ventura County Human Services Agency (the Agency) filed a petition alleging Grandmother failed to protect R.D. when she “delayed access” by social workers and law enforcement. (§ 300, subd. (b).) The petition also alleged Grandmother had “recurring substance abuse issues.” The petition alleged Grandmother was unable to provide care for R.D. because of her arrest in January 2017. (§ 300, subd. (g).) Moreover, the petition alleged Grandmother’s three children (including R.D.’s mother) were removed from her custody and declared dependents of the court because of domestic violence and

¹ Further unspecified statutory references are to the Welfare and Institutions Code.

substance abuse issues. (§ 300, subd. (j).) In addition, the petition alleged that R.D.'s mother and father both had domestic violence and substance abuse issues.

The juvenile court sustained the allegations in the petition. It ordered reunification services for Grandmother, including supervised visitation.

The six-month status report stated that Grandmother was actively participating in her case plan, but "demonstrated little behavioral changes." Her attendance at meetings with the social worker was "inconsistent." Although Grandmother attended the majority of her supervised visits with R.D., she was "significantly" late to "several visits" in the prior month. R.D. was doing well and appeared "bonded" to her caregivers and their children.

In an interim report, the social worker stated that Grandmother's "behavioral changes have been difficult to assess due to discrepancies between [her] statements and her actions." For example, she was invited to participate in Intensive Home Based Services (IHBS) with R.D. and R.D.'s counselor. Grandmother said she would participate, but she missed most of the sessions and the counselor had "difficulty" contacting her.

The 12-month status report stated that Grandmother continued to actively participate in her case plan, but her attendance was "inconsistent" and she "demonstrated few behavioral changes." There were "several instances" where Grandmother was untruthful or provided incorrect information to the Agency. For instance, she "consistently provided incorrect information regarding her attendance with" her counselor.

In an October 2018 interim report, the Agency reported that Grandmother was not "consistently participat[ing]"

in her case plan. She did not participate in weekly Al-Anon meetings as she reported; she provided information that conflicted with information from service providers and other professionals; and she “consistently failed to meet” with the social worker. The report also mentioned an incident in which Grandmother drove with a suspended license while R.D. was a passenger. Grandmother provided “inconsistent explanations” for why she drove with a suspended license.

The Agency further reported that Grandmother delayed providing written permission for an Individual Educational Plan (IEP) for R.D., despite multiple requests. As a result, there was a delay in an IEP assessment for R.D. Grandmother also did not attend many of R.D.’s IHBS counseling sessions.

The interim report also stated that Grandmother’s home was approved for home visits, and she signed an agreement acknowledging that “[n]o other family members,” including R.D.’s mother, were to be present during the home visits. Eight days later, Grandmother violated the agreement when R.D.’s mother was at the home during a visit. As a result, Grandmother’s home visits were terminated.

The 18-month status report stated that Grandmother participated in her case plan services, but “demonstrated few behavioral changes” and “consistently failed to meet” with the social worker. Grandmother provided “incorrect information regarding attendance in her case plan services.” She reported weekly attendance to counseling sessions, but she only attended monthly. She reported weekly attendance to Al-Anon meetings, but the facility had no record of her visits. “Throughout the dependency,” Grandmother did not take

responsibility for her actions and denied or misrepresented events when questioned about them. The report stated that R.D.'s caregivers have provided stability and quality care for R.D. For "several months," R.D. "consistently reported . . . that she would like to live with the caregivers permanently."

The Agency recommended the juvenile court terminate Grandmother's reunification services, terminate the legal guardianship, and set a section 366.26 hearing. Following a contested hearing, the juvenile court found that returning R.D. to Grandmother's custody would create a "substantial risk of detriment to the safety, protection or physical or emotional well-being of the child." The court terminated Grandmother's legal guardianship of R.D. (§ 366.22, subd. (a)), terminated reunification services, and set a section 366.26 hearing.

Grandmother subsequently filed a section 388 petition requesting that the court change its termination order and allow her to participate in the section 366.26 hearing. The court denied the petition, ruling section 728 "authorized the court to terminate the guardianship at the [section] 366.22 hearing."

DISCUSSION

Termination of Guardianship

Grandmother contends the trial court erred when it found that returning R.D. to Grandmother's custody would pose a substantial risk of detriment to R.D. We disagree.

The juvenile court shall order the return of a child to the custody of the guardian unless the court finds by a preponderance of evidence that the return would create a substantial risk of detriment to the safety, protection, or well-being of the child. The social worker has the burden of establishing risk of detriment. (§ 366.22, subd. (a).) We review

the court's finding regarding risk of detriment for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.)

In doing so, we view the evidence in the light most favorable to the prevailing party. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) We do not reweigh evidence, judge witness credibility, or resolve conflicts in evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) We draw all reasonable inferences in favor of the judgment. (*In re Misako R.*, at p. 545.)

Substantial evidence supports the juvenile court's finding that returning R.D. to Grandmother's custody posed a substantial risk of detriment to R.D. Despite 18 months of reunification services, Grandmother demonstrated "few behavioral changes." Throughout the dependency proceedings, Grandmother did not fully comply with her case plan, did not report accurate information regarding her participation in counseling and substance abuse services, did not take responsibility for her actions, often denied or misrepresented what had occurred, and "consistently failed to meet" with the social worker.

A week after signing a home visit agreement, Grandmother violated the agreement. Grandmother was late or did not show up to R.D.'s appointments such as the IHBS counseling sessions, and she delayed R.D.'s educational assessment when she delayed giving written permission for the assessment. This evidence supports the juvenile court's conclusion that Grandmother did not demonstrate she could "assure [R.D.] gets the services that she clearly needs."

Grandmother argues the juvenile court inappropriately considered R.D.'s bond with her caregivers when

it determined that returning R.D. to Grandmother's custody would be detrimental. However, the question of whether to return a child to a guardian's custody "is not governed solely by whether the [guardian] has corrected the problem that required court intervention; rather, the court must consider the effect such return would have on the child." (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 901; see also *Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704-705 [the court may consider "whether changing custody will be detrimental because severing a positive loving relationship with the foster family will cause serious, long-term emotional harm"].) The court properly considered R.D.'s bond with her caregivers, her desire to continue living with them, and the likelihood of emotional harm she would suffer from moving.² (*Constance K.*, at pp. 704-705.)

Lastly, Grandmother cites to *In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1397, in which the Court of Appeal held there was insufficient evidence to support the finding that returning the child to the mother's custody would create a substantial risk of detriment. There, the evidence showed the mother complied with her services, maintained her sobriety for over a year, was safely caring for another child, and was living in "appropriate housing." (*Id.* at pp. 1399-1401.)

Unlike *Yvonne W.*, the evidence here established that Grandmother did not change her behavior despite receiving over a year of services, did not consistently participate in counseling

² Grandmother also argues there was insufficient evidence R.D. would suffer emotional harm because there was no expert psychological evidence. But section 366.22 does not impose such a requirement.

and substance abuse services, and did not demonstrate she could adequately provide for R.D.'s needs. The juvenile court did not err in finding a substantial risk of detriment to R.D. if she was returned to Grandmother's custody.

Section 728

Grandmother contends section 728 is unconstitutional as applied here because it treats guardians differently from parents. A juvenile court may not terminate parental rights without a section 366.26 hearing, which requires clear and convincing evidence that it is likely a child will be adopted. (§ 366.26, subd. (c).) In contrast, a court may terminate a guardianship pursuant to section 728 "at any regularly scheduled hearing" if it finds by a preponderance of evidence that termination is in the best interest of the child. (§ 728, subd. (a); *In re Z.F.* (2016) 248 Cal.App.4th 68, 74.) Grandmother asserts that as a "Probate Code guardian," she "st[ood] in the shoes" of a parent, and therefore section 728 violates her equal protection rights.³ We disagree.

To prevail on an equal protection challenge, a party must first establish that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530, italics omitted.) If such a classification exists, the next inquiry is to determine whether to apply a strict scrutiny or rational basis standard. We will apply the strict scrutiny standard if the

³ The Agency contends Grandmother forfeited this claim. She did not, because she raised the constitutional argument in her section 388 petition.

classification “proceeds along suspect lines”⁴ or “infringes” upon a fundamental right. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644 (*Warden*); see also *In re H.K.* (2013) 217 Cal.App.4th 1422, 1433.) Otherwise we will apply the rational basis standard and will uphold the classification if it is reasonably related to a legitimate state interest. (*Warden*, at p. 644.)

Grandmother cannot establish the first prong because parents and guardians are not similarly situated. Parents have a fundamental right to the “companionship, care, custody and management” of their children. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306 (*Marilyn H.*.) This fundamental right does not terminate when a guardian for their child is appointed; rather it is “suspended.” (*In re Kayla W.* (2017) 16 Cal.App.5th 409, 416; see Fam. Code, § 7505, subd. (a).) The government may not interfere with this fundamental right “in the absence of a compelling state interest.” (*Marilyn H.*, at p. 307.)

Accordingly, California statutes include procedural protections for parents by imposing higher standards of proof in actions that interfere with a parent’s fundamental right. Section 366.26, which expressly pertains to the termination of “parental rights,” requires the state to prove by “clear and convincing” evidence that it is likely a child will be adopted. (§ 366.26, subd. (c)(1).) The statutory exceptions set forth in section 366.26, subdivision (c)(1)(B) plainly state that they apply to “parents.”

In contrast, guardians do not have a constitutionally recognized fundamental right to the companionship, care, custody and management of a child. (Compare *Guardianship of Ann S.*

⁴ A suspect class include “race, gender, national origin, and alienage.” (*Jensen v. Franchise Tax Bd.* (2009) 178 Cal.App.4th 426, 434.)

(2009) 45 Cal.4th 1110, 1136 [guardians have “substantial interests” over a dependent child] with *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 251 (*Cynthia D.*) [“Parental rights . . . are a fundamental liberty interest”].) Guardianships are conditional and less stable than parental relationships. (See *Guardianship of Ann S.*, at pp. 1122-1123; see also *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344 [dependency guardianship “is not irrevocable and thus falls short of the secure and permanent future” for the child].) Thus, parents and guardians are not similarly situated.⁵

Even if Grandmother could prove that guardians and parents are similarly situated, she cannot prove the second prong of her equal protection challenge. Because Grandmother has not identified a suspect class or an infringement of a fundamental right, we apply the rational basis standard. (*Warden, supra*, 21 Cal.4th at p. 644.) Because the state has an interest in preserving the parent-child relationship, affording parents greater procedural protections is rationally related to this state interest. (See *Cynthia D., supra*, 5 Cal.4th at p. 255.) Moreover, the state has an interest in protecting the welfare of the child and providing the child with a stable and permanent home. (*Marilyn H., supra*, 5 Cal.4th at p. 307.) Because guardianships are less stable than parental relationships, the state has an interest in

⁵ To the extent Grandmother argues disparate treatment between guardians appointed by the probate court and those appointed by a dependency court, any distinction between those groups is not relevant here. The court may terminate both types of guardianships at any time if it is in the “best interest” of the child. (§§ 366.3, subd. (b), 728; Prob. Code, § 1601; *In re Z.F., supra*, 248 Cal.App.4th at p. 74.)

expeditiously terminating guardianships that do not serve the child's "best interest."

Finally, Grandmother argues that because she is R.D.'s grandmother and R.D. has been in her care for an extended period of time, she should be "afforded the same rights the statute gives the parent." Her argument is unavailing. Neither the law nor the evidence supports Grandmother's argument that her relationship with R.D. is one that compels the same protections afforded to parents.

DISPOSITION

The judgment (order terminating guardianship, terminating reunification services, and denying the section 388 petition) is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Tari L. Cody, Judge

Superior Court County of Ventura

John L. Dodd, under appointment by the Court of
Appeal, for Defendant and Appellant.

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